



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPLICATION NO. 379 OF 2015

OLIVIA RANGUMA1ST DEFENDANT/APPLICANT

JACK RANGUMA2ND DEFENDANT/APPLICANT

VERSUS

KERYNEA ATIENO OGUTU.....PLAINTIFF/ RESPONDENT

RULING

1. The subject of this ruling is the Amended Notice of Motion application dated 10th November 2015.
2. In the amended motion, the applicants are seeking for orders that ; they be allowed to file an appeal out of time ; that there be a stay of execution of the orders given by the subordinate court on 16th December 2013 and finally that the costs of the application be provided for. The motion is supported by the affidavit of **Francis Eric Wasuna** sworn on 10th November 2015. When served with the motion the respondents filed grounds of opposition, to oppose the motion.
3. The brief summary of the case is that judgment was entered against the applicants in default of appearance on 16th December 2013. Aggrieved by the court's decision, the applicants proceeded to apply for the exparte judgment to be set aside and for an order for stay of execution before trial court but their application was dismissed on 23rd October 2014. They averred that, their counsel who had the conduct of the suit relocated to Kisumu and did not leave instructions regarding the suit. The applicants also aver that the advocates on record misplaced their file when their offices was under renovation until April 2015 when it was traced. They argue that it was for the aforesated reasons that they failed to file an appeal within the stipulated time. The applicants averred they will show on appeal that the trial court lacked jurisdiction to hear and determine the suit because the cause of action was statute barred under section 4 of the Limitation of Actions Act.
4. The respondent in response argued in her grounds of opposition that the application has been brought after an inordinate delay of more than one year. She contended that the applicants want to appeal against decisions that were rendered on 20.11.2012 and 26.05.2014 a period of more than a year and which were filed on the eve of the day the Notice to Show cause is fixed for hearing before the Magistrate's court. She argued that the delay in bringing the application to extend time for filing an appeal out of time has not been sufficiently explained. She concluded that the application is an abuse of the court process since litigation must come to an end.
5. I have considered the grounds outlined on the face of the amended motion plus the facts deponed in the affidavit filed in support and against the application plus the grounds of opposition. As it

appears on the face of the motion, the respondents are basically asking to be granted orders of stay of execution pending appeal and leave to file appeal out of time. In determining such an application, the court's discretion is wide and unfettered. The applicants have relied on the supporting affidavit of **Francis Eric Wasuna** in which it is deponed that the delay to file an appeal in time was caused by two main factors. First, it said that the file relating to the matter was inadvertently misplaced when their advocates office was being renovated. Secondly, that **Mr. Anthony Odhiambo** the applicant's previous advocate relocated to Kisumu town without leaving any instructions on the file for the succeeding advocate to make a follow up. The applicants have also argued that they have an arguable appeal. The respondent has not filed any affidavit to controvert the averments of **Mr. Francis Eric Wasuna**. The respondent has instead filed grounds of opposition which merely stated that the delay to file the application was inordinate. I am satisfied that the applicants have explained the reasons for the delay. I will in the circumstances exercise my discretion in their favour.

6. The applicants have applied for an order of stay pending the hearing of the intended appeal. It is clear to me that if I don't grant the order, the respondent will execute the decree thus rendering the appeal nugatory. This in my view, is substantial loss. I am satisfied that there is need to maintain the ring evenly pending appeal by granting the order.

7. In the end I allow the amended motion in the following terms:

- i. The applicants are granted leave of 15 days to file an appeal out of time;
- ii. There be a stay of execution pending appeal;
- iii. Costs of the amended motion to abide the outcome of appeal.

Dated and delivered in open court this 18th day of November, 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicants

.....for the Respondents